No. 79-521

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

CONSUMER PRODUCT SAFETY COMMISSION, *et al.*,
Petitioners,

v.

GTE SYLVANIA, INCORPORATED, RCA CORPORATION, THE MAGNAVOX COMPANY, ZENITH RADIO CORPORATION, MOTOROLA, INC., WARWICK ELECTRONICS, INC., FORD AEROSPACE & COMMUNICATIONS CORPORATION, MATSUSHITA ELECTRIC CORPORATION OF AMERICA, SHARP ELECTRONICS CORPORATION, TOSHIBA-AMERICA, INC., GENERAL ELECTRIC COMPANY, ADMIRAL CORPORATION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR RESPONDENTS IN OPPOSITION

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TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS—Continued

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BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit, which is reprinted as Appendix A to the petition (hereafter "App. A"), is reported at 598 F.2d 790 (1979). The opinion of the United States District Court for the District of Delaware, which is reprinted as Appendix C to the petition (hereafter "App. C"), is reported at 443 F. Supp. 1152 (1977) and expressly incorporates earlier findings of fact and conclusions of law set forth in that court's earlier decision reported at 404 F. Supp. 352 (1975).

QUESTION PRESENTED

Whether the Court of Appeals correctly affirmed entry of a permanent injunction that precludes the Consumer Product Safety Commission ("CPSC") from disclosing certain "TV-related accident" information furnished to the CPSC in confidence by respondent television manufacturers, where the CPSC failed to take reasonable steps to assure that the information it proposed to disclose was accurate and that disclosure would be fair in the circumstances and reasonably related to effectuating the purposes of the Consumer Product Safety Act, as required by Section 6(b)(1) of the Act, 15 U.S.C. § 2055(b)(1).

STATEMENT

The Gathering of the Information

In 1974, the CPSC began to investigate hazards supposedly associated with television receivers and to consider the necessity of developing safety standards for such receivers. (C.A. App. 450;[1] 39 Fed. Reg. 10,929 (1974).) The public notice by which the investigation was initiated requested television manufacturers to submit to the CPSC all "TV-related accident" data collected by them since hearings held in 1969 by the National Commission on Product Safety. *Id.* at 10,930.[2]

After reviewing the data voluntarily submitted in response to the public notice, the CPSC decided to use compulsory procedures to obtain additional data. On May 13, 1974, a special order was forwarded to twenty-five manufacturers requesting submission of virtually the

[1] "C.A. App." refers to the Joint Appendix to the briefs in the Court of Appeals.

[2] It is noteworthy that five years later, after a thorough review of the safety of television receivers, CPSC found that no standards were necessary and terminated its investigation. 44 Fed. Reg. 44,206 (1979).

same information that had been requested in the public notice. (C.A. App. 451-52, 608-12, 644-48.) On July 26, 1974, subpoenas *duces tecum* were issued to the twelve respondents (and four other manufacturers), ordering them to furnish the CPSC with "TV-related accident reports." (C.A. App. 394-95; *see, e.g., id.* 615-18.)

The manufacturers' submissions in response to the notice, special orders, and subpoenas were accompanied by claims of confidentiality. (C.A. App. 392-93, 397, 452; *see, e.g., id.* 613, 623.) The manufacturers also claimed that any disclosure of the information by the CPSC based on absolute numbers would be grossly misleading. (*See, e.g.*, C.A. App. 588, 631, 788.)

From the very outset of the investigation, the manufacturers' compliance with the CPSC's various requests for information was impeded by the repeated failure of the CPSC to define the term "TV-related accident." (*See, e.g.*, C.A. App. 651-53, 802, 804; App. A 12a.) This problem was exacerbated by the fact that there was and is no generally accepted definition of this term in the television industry. (C.A. App. 395 n.19, 802.) However, despite warnings that the vagueness of its requests would inevitably result in confusion as different manufacturers gave varying meanings to the term "TV-related accident" (C.A. App. 1056), the CPSC made no attempt whatsoever to define this term (C.A. App. 804).

As predicted, the failure of the CPSC to define "TV-related accident" resulted in nonuniform responses to the notice, special orders, and subpoenas because some manufacturers applied a much more restrictive definition to this term than did others. (C.A. App. 403-05, 818.)[3]

[3] The CPSC refused to exclude any of the reports submitted, and, in its analysis of the submissions, regarded as "TV-related accidents" such situations as a fire caused by a burning candle sitting on top of a television set or a hernia sustained while carrying a television set. (C.A. App. 404, 807, 893.)

For example, some manufacturers furnished data only for alleged incidents involving personal injury or damage to property external to the television set, whereas other manufacturers submitted reports on alleged incidents that involved damage to the sets only. (*See, e.g.*, C.A. App. 590, 676, 682.) Similarly, certain manufacturers limited their submissions to data for alleged incidents relating to television sets manufactured subsequent to 1969, whereas other manufacturers furnished reports on alleged incidents that came to their attention within the period in question, without regard to the date of manufacture of the sets alleged to have been involved. (*See, e.g.*, C.A. App. 591, 673, 682.)

Although the CPSC conceded that some manufacturers were "more conscientious than others in maintaining television accident files" (App. A 13a; C.A. App. 102), it made no attempt to compel more uniform compliance with its special orders and subpoenas because in its "technical judgment . . . sufficient information [had] been collectively submitted by the sixteen manufacturers to significantly facilitate [its] regulatory development activities for TV receivers" (C.A. App. 685).

Finally, compounding the unreliability of the submitted information as a whole and the impossibility of drawing meaningful comparisons among manufacturers was the fact that the special orders and subpoenas required the manufacturers to supply all reports of "TV-related accidents" without regard to whether the reports were verified. (C.A. App. 655.) The surprisingly loose standards of reliability and accuracy for the data sought by the CPSC were indicated on the sample data forms accompanying the subpoenas, which explicitly acknowledged that "in many cases" the data would be "incomplete, unverified and even incorrect." (*Id.*; App. A 12a.)

The CPSC took no steps to determine whether any of the alleged "TV-related accidents" referred to in the

reports submitted by the manufacturers were in fact caused by the television sets involved (C.A. App. 1046) or, indeed, whether they had actually occurred (C.A. App. 987-88), except to investigate fewer than 100 (1.3%) of the 7,620 reported incidents (C.A. App. 815).

After reviewing the manufacturers' submissions, the CPSC hired a contractor to computerize the information and to prepare a printout listing each alleged incident reported by a manufacturer and cataloging it by type. (C.A. App. 454, 476.) The printout does not indicate that something other than the television set itself may have been the cause of any of the "TV-related accidents" listed (C.A. App. 898), or that most of the reports from which the printout was compiled are unverified or come from an unreliable source (C.A. App. 876-77, 881, 899, 1020). In short, the printout suffers generally from the same defects as the underlying data. (C.A. App. 403-05, 585, 818, 936.) The CPSC's own consultants and engineers admitted that comparisons among the manufacturers on the basis of the collected "TV-related accident" data would not be proper and would not aid in making safety comparisons or serve any other useful purpose. (C.A. App. 915-18, 1028, 1048-49.)

The CPSC's Determination To Release the Information

On June 14, 1974, pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, Consumers Union of the United States, Inc., and Public Citizen's Health Research Group formally requested the CPSC to disclose the information submitted in response to its special orders. (C.A. App. 453; *see id.* 460-63.) The manufacturers were informed of the requests (C.A. App. 453; *see, e.g., id.* 622) and responded by reasserting their claims of confidentiality of their submissions (C.A. App. 628-36, 660-63.)

By letters dated April 7 and 8, 1975, the CPSC notified the manufacturers of its determination, notwithstanding the melange of inaccuracies in the "TV-related accident" information that had been submitted, to release both the underlying information and the computer printout cataloging it. (*See, e.g.*, C.A. App. 637-38.) The letters were accompanied by copies of a memorandum from the Office of General Counsel dated March 21, 1975 (the "Cull Memorandum") (C.A. App. 96-102), which the manufacturers were told "formed the basis" for the CPSC's decision to disclose the material in question. (C.A. App. 456; *see, e.g., id.* 638.) The Cull Memorandum recognized "that some television manufacturers have apparently been more conscientious in compiling accident data than others and thus, the release of the accident data might be misleading in some cases," and recommended that the CPSC offer to accompany the release of the data with a statement reflecting this fact. (C.A. App. 102.) The Cull Memorandum went on to conclude that the data was not exempt from disclosure under the FOIA as confidential commercial information and that even if it were so exempt it should be released "because of the overriding public health and safety issues involved." (C.A. App. 100; *see also id.* 456-57.)

Proceedings in the District Court

Upon being advised in April of 1975 that the CPSC had made a final determination to release the information to the public, the manufacturers brought suit in various federal judicial districts against the CPSC seeking to enjoin disclosure of their submissions on the grounds that release was barred, *inter alia*, by certain exemptions to the FOIA, 5 U.S.C. § 552(b); by Section 6 of the Consumer Product Safety Act ("CPSA"), 15 U.S.C. § 2055; and by the Trade Secrets Act, 18 U.S.C. § 1905. *See GTE Sylvania, Inc.* v. *Consumer Product Safety Commission*, 404 F. Supp. 352, 365 (D. Del. 1975). The

actions were ultimately consolidated before Chief Judge Latchum of the United States District Court for the District of Delaware, where the majority of them had been brought. (C.A. App. 304-09, 312-16.)

Temporary restraining orders prohibiting the disclosure of the information *pendente lite* were entered shortly after commencement of the manufacturers' actions. (C.A. App. 278-303, 310-11.) On October 23, 1975, after extensive briefing and argument, Chief Judge Latchum preliminarily enjoined the CPSC from disclosing the requested information (C.A. App. 384-86) on the ground that the CPSC had failed to comply with Section 6(b)(1) of the CPSA, 15 U.S.C. § 2055(b)(1), in that the CPSC had deliberately subpoenaed unverified and inaccurate information, the disclosure of which would be misleading to the public and unfair to the manufacturers. 404 F. Supp. at 370-73 (*see* App. C 78a).

The District Court held that Section 6(b)(1) imposes three "affirmative obligations" that must be fulfilled before the CPSC may publicly disclose—pursuant to the FOIA or otherwise—information from which the identity of a manufacturer can be readily ascertained and that "[f]ailure to comply with any one of the standards means that disclosure would be improper." 404 F. Supp. at 369. The court found that none of the standards had been met here because (1) the CPSC had not taken reasonable steps to assure that the information submitted by the manufacturers was accurate and because disclosure of the information would be neither (2) fair in the circumstances nor (3) reasonably related to effectuating the purposes of the CPSA. *Id.* at 371-73.

The preliminary injunction remained in effect until December 8, 1977, when, after further briefing and argument, the District Court granted the manufacturers' motions for summary judgment and permanently enjoined

disclosure of the information in question. *GTE Sylvania, Inc.* v. *Consumer Product Safety Commission*, 443 F. Supp. 1152 (D. Del. 1977) (App. C 77a-104a).

Proceedings in the Court of Appeals

On the CPSC's appeal, the United States Court of Appeals for the Third Circuit (Seitz, Chief Judge; Gibbons and Higginbotham, Circuit Judges) unanimously affirmed in its entirety Judge Latchum's permanent injunction. *GTE Sylvania, Inc.* v. *Consumer Product Safety Commission*, 598 F.2d 790 (3d Cir. 1979) (App. A 1a-70a).

In an opinion by Chief Judge Seitz, the court analyzed the language of Section 6(b)(1) in relation to various other sections of the CPSA and conducted an exhaustive review of the legislative history of the CPSA as enacted and subsequently amended. The court held that because the Act gave the CPSC "broad information-gathering authority" not available to the public or to other governmental agencies, Section 6(b)(1) was included to "insure that the Commission's authority to release such information would be limited." (App. A 59a.)

Consequently, the Court of Appeals agreed with Judge Latchum's conclusion that, by proposing to release the misleading, inaccurate, and unverified information it had demanded from the manufacturers, the CPSC had not complied with the requirement of Section 6(b)(1) to take "reasonable steps" to assure the accuracy of information it intends to release. (App. A 69a.) Accordingly, disclosure to the public through the FOIA or otherwise had to give way to the Congressional intent expressed in Section 6(b)(1) to "protect manufacturers from the harmful effects of inaccurate or misleading public disclosure . . . through any means, of material obtained pursuant to [the CPSC's] broad information-gathering powers." (App. A 59a.)

REASONS FOR DENYING THE WRIT

1. The Decision of the Court Below Is Not of the Far-Reaching Significance Urged by the CPSC.

By adopting an unreasonably broad interpretation of the Court of Appeals' opinion regarding Section 6(b)(1), petitioners attempt to create an illusion of an administrative burden in order to convince this Court that the petition for a writ of certiorari should be granted. The opinion does not impose any such burden justifying a grant of certiorari.

The CPSC misinterprets the scope of the court's decision when it asserts that the decision would require the agency to "verify the accuracy of the information it produces pursuant to the FOIA" in order to comply with Section 6(b)(1). (Petition at 12; *see id.* at 11, 13 n.8.) To the contrary, by its own terms Section 6(b)(1) requires only that the CPSC "take reasonable steps to assure" that the information it proposes to disclose is accurate. Verification is totally unnecessary if such steps are taken.

Both courts below made it quite clear that the CPSA does not require the CPSC to guarantee the accuracy of the information contained in documents that it intends to release. In Judge Latchum's words:

> It must be emphasized that the Commission is not a guarantor of the accuracy of the information which it releases; to require the Commission to prove that its materials are accurate would raise an insurmountable barrier to disclosure. Instead, an affirmative obligation to "take reasonable steps to assure" that information which it releases is accurate has been imposed on the Commission.

404 F. Supp. at 370 (footnotes omitted). Here, of course, where the CPSC's own requests for information required

the submission of all reports, unverified and verified, Section 6(b)(1) does prohibit disclosure. Indeed, like the District Court, we are "at a loss to understand how demanding submission of inaccurate data constitutes a reasonable step in assuring the accuracy of information." *Id.* at 371.

Since neither the statute nor the Third Circuit's opinion requires actual verification of the information contained in respondents' documents, petitioners' argument that the CPSC cannot operate under the Third Circuit's interpretation because it would be a "substantial, if not impossible, administrative burden on the agency to verify the accuracy of the information" it proposes to release pursuant to the FOIA (Petition at 12) is wholly unfounded. Moreover, it has not been established that verification would create any such burden. Petitioners state that in 1978 alone the CPSC received approximately 7,800 FOIA requests, some 60 to 70 percent of which related to consumer complaints. (*Id.*)[4] However, petitioners overlook the paucity of FOIA litigation involving the CPSC and the very limited number of objections to disclosure received by the CPSC from third parties in the past. These both demonstrate that any "administrative burden" suggested by petitioners to excuse the CPSC from complying with its statutory mandate is more imagined than real.[5]

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[4] Respondents have not had an opportunity to test fully the reliability and accuracy of petitioners' extra-record citations. Further, it is a well-established principle that this Court "take[s] a case . . . as it comes to [it] in the record, and receive[s] no new evidence." *Pacific R.R.* v. *Ketchum*, 101 U.S. 289, 296 (1880); *see also Henneford* v. *Northern Pac. Ry.*, 303 U.S. 17, 19 (1938); *Chapman & Dewey Lumber Co.* v. *St. Francis Levee Dist.*, 234 U.S. 667, 668 (1914); *Hussman* v. *Durham*, 165 U.S. 144, 150 (1897).

[5] Indeed, there is no burden whatsoever being imposed at this time because the agency's present regulations state that Section 6(b)(1) applies only to "affirmative dissemination of information" by the CPSC and not to FOIA requests. 16 C.F.R. § 1115.15 (August 7, 1978); *see also* proposed regulations appearing at 42 Fed. Reg. 54,304 (October 5, 1977) (to be codified in 16 C.F.R. § 1013). This, of course, is the statutory interpretation petitioners urged the Court of Appeals to adopt with a notable lack of success.

Despite the claimed volume of FOIA requests received by the CPSC, respondents have been able to discover only four reported cases involving it and the FOIA in the seven years that the agency has been in existence. Two of these comprise the Second and Third Circuit opinions discussed in the petition, and a third arises out of the Third Circuit litigation and is now before this Court on a totally unrelated question. *See GTE Sylvania, Inc.* v. *Consumers Union of the United States, Inc.*, No. 78-1248. These three cases were all filed in 1975.[6] The fourth case, *International Harvester Co.* v. *Consumer Product Safety Commission*, No. 79 C 1185, was filed in the Northern District of Illinois in 1979.[7]

Furthermore, in response to an FOIA request recently made by counsel for one of the respondents, the CPSC has stated that only twelve objections to the release of documents have been received thus far in 1979. The CPSC believes that only five were received in 1978 and three in 1977. Only two of the twelve objections made in 1979 were based on Section 6(b)(1), and it is believed that only two objections made in 1978 and only one in 1977 were based on this statutory provision. These figures reveal that, despite a large number of FOIA requests

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[6] 1979 Annual Report, Consumer Product Safety Commission, Appendix I, p. 111.

[7] Petitioners' concern over possible forum shopping (*see* Petition at 11) is convincingly refuted by the forum selected by International Harvester. The Delaware District Court's interpretation of Section 6(b)(1) has been publicly available since October, 1975. If petitioners were correct, International Harvester, a Delaware corporation, should have filed suit in the District of Delaware because the CPSC had decided to release the documents at issue and the corporation is opposing disclosure based on the CPSC's failure to comply with Section 6(b)(1), among other statutory provisions.

received by the CPSC in the four years since Judge Latchum's opinion was published, only a handful of objections to disclosure have been made and fewer still have been based on Section 6(b)(1). It is particularly telling that objections to disclosure were registered in only five of the 7,800 FOIA requests the CPSC claims to have received in 1978, and in only two cases were the objections based on Section 6(b)(1).

The extra-record references made by the CPSC, which purport to demonstrate the seemingly Herculean task required to comply with Section 6(b)(1), are also misleading by their failure to reflect several statutory and regulatory burdens already imposed on the CPSC before it may release any documents pursuant to an FOIA request. This Court recently held in *Chrysler Corp.* v. *Brown*, —— U.S. ——, 99 S. Ct. 1705 (1979), that the Trade Secrets Act,[8] 18 U.S.C. § 1905, provides a statutory basis for preventing disclosure of certain types of trade secret and confidential information that must be considered by the CPSC. Additionally, the CPSC's own regulations make it clear that the CPSC will withhold information exempt from mandatory disclosure under the FOIA pursuant to 5 U.S.C. § 552(b) whenever the CPSC "determines that disclosure is contrary to the public interest." 16 C.F.R. § 1015.15; *see id.* § 1015.16.[9] Thus,

[8] The CPSA expressly prohibits the agency from releasing the types of information protected by the Trade Secrets Act and does not allow for release even pursuant to quasi-legislative regulations as does the more general statute. *See* 15 U.S.C. § 2055(a)(2); *see also Chrysler Corp.* v. *Brown, supra.*

[9] The Annual Report on the Administration of the Freedom of Information Act, Calendar Year 1978, Consumer Product Safety Commission (March 1, 1979), states that 69 of the 7,800 requests for Commission records were denied in whole or in part. Forty-nine of these dealt with the FOIA exemption for trade secrets embodied in 5 U.S.C. § 552(b)(4), and in all instances, documents were released only after certain confidential information was excised. Thus, the CPSC's own Annual Report discloses that the trade secrets exemption alone has created a more serious "burden" than Section 6(b)(1) is likely to do.

the CPSC already must carefully scrutinize all information before disclosing it pursuant to the FOIA and whatever "burden" is imposed upon the agency by the decision below will add little to its present obligations.[10]

In any event, as previously noted, compliance with the opinions of the courts below requires only minimal effort on the part of the CPSC. "Clearly defining the data that it sought and seeking full compliance with its subpoenas were but two reasonable steps which the Commission could have taken to assure that the information was accurate." 404 F. Supp. at 371 (footnote omitted). The CPSC, therefore, can meet the requirements of Section 6(b)(1) by tailoring its requests for information in such a manner as to assure that it obtains only accurate and reliable data.[11] The fact that "reasonableness" of inquiry or draftsmanship is all that is required of the CPSC certainly vitiates any attempt by petitioners to assert that some enormous "administrative burden" warrants review of the decision below by this Court.

2. Neither the Purported Conflict nor the Alleged Error of the Court Below Makes Review Appropriate at This Time.

Petitioners argue that this Court's review of the decision below is needed to resolve a perceived conflict

[10] In this case, respondents *voluntarily* complied with the demands of the CPSC for the submission of confidential, inaccurate, and unverified information. However, such voluntary compliance would be discouraged in the future if the CPSC were permitted to prevail in its position that there is no statutory assurance that such information—not otherwise available to the public—will not be disclosed to FOIA requesters. By thus impeding the ability of the CPSC to obtain the information it deems necessary to carry out its functions, the position of the CPSC would seem to create a more serious burden than that of which it complains in the petition for certiorari.

[11] Of course, a balancing of interests is involved. If the CPSC in its own discretion decides that unverified and inaccurate information is needed in its data base for rulemaking or investigatory purposes, then it should be prepared to deny release of such information pursuant to the FOIA.

between two circuits on the question of the applicability of Section 6(b)(1) of the CPSA to FOIA requests.[12] We suggest that review of the decision is not necessary at this time because of the divergent factual backgrounds of the cases presented to the only two circuits that have ruled on the issue and the overbroad reading petitioners give the decision below. (*See* pp. 9-13, *supra.*) This Court should at least stay its hand until other courts have had an opportunity to resolve any perceived conflict,[13] and to align themselves with the conclusion reached by the Third Circuit, as we are confident that they will.

Petitioners do not discuss the significant background of this litigation that led to the entry of the preliminary and permanent injunctions by the District Court. Judge Latchum repeatedly noted that the misleading, unverified, and inaccurate information proposed to be released was obtained from the manufacturers by the CPSC's own notice, orders, and subpoenas. The ambiguities in the document requests, the CPSC's failure to demand uniform compliance with the requests, and the unjustifiable and irreparable damage that could befall the manufacturers because the data do not form any reliable foundation for safety comparisons were all critical findings made by the District Court that the CPSC did not (and, indeed, could not) challenge on appeal. (*See* App. A 26a-27a.) None of these factors was presented to the Second Circuit in *Pierce & Stevens Chemical Corp.* v. *Consumer Product Safety Commission*, 585 F.2d 1382 (2d Cir. 1978), the decision with which the decision below purportedly conflicts.

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[12] Rule 19 of the Revised Rules of this Court states that the existence of an intercircuit conflict is "neither controlling nor fully measuring the court's discretion."

[13] As stated by Mr. Justice Frankfurter respecting a denial of a petition for a writ of certiorari, "It may be desirable to have different aspects of an issue further illumined by the lower courts. Wise adjudication has its own time for ripening." *Maryland* v. *Baltimore Radio Show*, 338 U.S. 912, 918 (1950).

Pierce & Stevens involved an FOIA request by an injured consumer for a copy of a plant inspection report prepared by the Food and Drug Administration pursuant to the Federal Hazardous Substances Act, 15 U.S.C. §§ 1261 *et seq.*, that later came into the possession of the CPSC. That is a far cry from the case at bar where at issue is *private* information obtained in a fashion that itself made the information inaccurate and its proposed publication misleading. Respondents submit that had the Second Circuit had before it the facts of this litigation, it might very well have reached the same result as did the Third Circuit.[14]

In determining that Section 6(b)(1) prohibits the CPSC's proposed release of information in this case, the Third Circuit focused on four significant points. A brief discussion of each of these points will illuminate the opinion below and demonstrate both its correctness as a matter of law and its emphasis on the facts of the case before it, facts that did not exist in *Pierce & Stevens.*

First, after a careful and thorough analysis of the language of Section 6(b)(1) and its relation to the rest

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[14] Mr. Justice Harlan noted:

> [D]ifferences between the Courts of Appeals in two or more Circuits will not be accepted as a conflict if they can fairly be accounted for on the basis of variations in the factual situations among the cases involved. Finally, even where a "true" conflict may be said to exist, *certiorari* will sometimes be denied where it seems likely that the conflict may be resolved as a result of future cases in the Courts of Appeals.

Harlan, *Some Aspects of the Judicial Process in the Supreme Court of the United States*, 33 Austl. L.J. 108, 111-12 (1959). The issue of Section 6(b)(1)'s applicability to FOIA requests is fully briefed and before the United States District Court for the Northern District of Illinois on a motion for summary judgment filed by the defendants in *International Harvester Co.* v. *Consumer Product Safety Commission*, No. 79 C 1185. Since the CPSC has not acquiesced in the decision below as to the applicability of Section 6(b)(1) to FOIA requests, it seems reasonable to believe that to the extent this issue arises again other courts will be able to contribute their insight.

of the statute, the Third Circuit rejected the CPSC's argument that it should defer to the agency's interpretation of the provision, applying it only to information "affirmatively released" (*i.e.*, press releases or speeches). Instead, the Court of Appeals concluded that the provision applies to both CPSC-initiated disclosures and the release of information pursuant to the FOIA. (App. A 32a-41a.) The court found persuasive the fact that Congress did not include the disclosure of information pursuant to an FOIA request among the specific exemptions to the requirements of Section 6(b)(1) set forth in Section 6(b)(2), 15 U.S.C. § 2055(b)(2). (App. A 38a, 40a-41a.) The court also noted that pursuant to Section 25(c) of the CPSA, 15 U.S.C. § 2074(c), the CPSC is required to disclose accident and investigation reports to the public but only to the extent permitted by Section 6(a)(2) (prohibiting disclosure of trade secret information protected by 18 U.S.C. § 1905) and Section 6(b)(1). Thus, "section 25(c) makes section 6(b) applicable to at least some information obtained or generated by the Commission, the disclosure of which could be requested under the FOIA." (App. A 39a.)

Second, based on its careful analysis of the legislative history of the CPSA, the Court of Appeals concluded that the information disclosure requirements of the Act were intended to protect manufacturers from the harmful effects of inaccurate or misleading public disclosure by the CPSC, through any means, of material obtained pursuant to its uniquely broad information-gathering powers. (App. A 59a.) Thus the court held that Congress designed Section 6(b)(1) to limit the CPSC's authority to release such material by requiring the agency to take reasonable steps to assure that information disseminated to the public (whether affirmatively or pursuant to the FOIA) would be accurate and fairly presented.

Third, upon the urging of the CPSC, the court examined a Conference Committee Report on the Consumer Product

Safety Commission Improvements Act of 1976, which, in the course of discussing a new provision to be added to the CPSA, apparently adopted the agency's interpretation of Section 6(b)(1). (App. A 54a-57a.) The court was unpersuaded by this rather gratuitous statement in one of the several reports discussing the 1976 amendments, which themselves did not address in any way the scope of Section 6(b)(1) which was enacted in 1972, and concluded:

> Given our view that the legislative history of section 6(b)(1) itself strongly supports an inference that the Commission's interpretation of that provision conflicts with the intent of the Congress that enacted it, we are unwilling to accept the isolated, and in our view erroneous, conclusion of a later congressional committee as persuasive authority to the contrary.[15]

(App. A 56a.)[16]

Fourth, the Court of Appeals addressed the CPSC's argument that the interpretation of Section 6(b)(1) reached by the lower court renders that provision inconsistent with the scheme of the FOIA. (App. A 60a-63a.) The court held that any apparent inconsistencies between the two statutes were unpersuasive given its conclusion that Section 6(b)(1) is a withholding statute of the kind described by Exemption 3 of the FOIA, 5 U.S.C. § 552(b)(3). (App. A 60a-63a.) In contrast to peti-

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[15] The District Court reached a similar conclusion based on the reasons noted by the Court of Appeals and on the additional reasoning that the Conference Committee was merely discussing "the need for some sort of accommodation between the different time restraints imposed by Section 6(b) and the FOIA." (App. C 84a; *see* p. 18, n.17, *infra*.) Significantly, the District Court emphasized that "the [Conference Committee] statement does not make Section 6(b) altogether inapplicable in the face of a FOIA request, as the Commission would do." (App. C 84a.)

[16] The court also noted that the language of the Conference Committee was inconsistent with the fact that "section 25(c) of the CPSA, by its terms, applies the requirements of section 6(b)(1) to FOIA requests for accident investigation reports." (App. A 57a.)

tioners, who rely heavily on the differing time limitations provided by Section 6(b)(1) and the FOIA, the court discussed several means by which these two limitations could be reconciled.[17]

In short, the Third Circuit concluded that Congress made a considered judgment that the CPSC was not to release information identifying a particular manufacturer unless it first notified the manufacturer of its intent to do so and took reasonable steps to satisfy itself of the accuracy and fairness of the proposed disclosure. (App. A 66a.) The court also pointed out that the CPSC's proposed interpretation of Section 6(b)(1) as applied to the facts of this litigation would effectively eviscerate the Congressional design:

> Congress's concern that manufacturers might be harmed by the public disclosure of inaccurate and misleading information obtained by the Commission is implicated in this case to the same extent that it would be implicated by a Commission press release. *The Commission obtained the material at issue, otherwise unavailable to the public, through its information-gathering authority under the CPSA.*

(App. A 68a; emphasis added.)

* * * *

The Third Circuit's decision was clearly correct under the facts presented. The legislative intent in enacting Section 6(b)(1) must outweigh any concern as to the

[17] It is important to note that the specific 30-day notice provision of the CPSA's Section 6(b)(1) was enacted in 1972 (Pub. L. No. 92-573, 86 Stat. 1212) and the more general requirement that agencies rule on FOIA requests within 10 days (*see* 5 U.S.C. § 552(a)(6)(A)(i)) in 1974, some two years later (Pub. L. No. 94-502, 88 Stat. 1561). Additionally, Section 6(b)(1) itself provides for a shortening of the 30-day period in appropriate circumstances. Moreover, in complex FOIA requests such as these where thousands of documents are sought, it is inconceivable that any requester would expect the agency to produce all such documents within 10 days. It took 10 months for the CPSC to review the documents in issue in this case, and the requesters acquiesced (as they had to) in the agency's timetable.

administrative burden created by the provision—a burden we have already demonstrated is more imagined than real. (*See* pp. 9-13, *supra.*) The only other asserted ground for granting certiorari is the alleged conflict between the decision in this case and the *Pierce & Stevens* decision. Although the interpretations of the scope of Section 6(b)(1) in the two cases are clearly divergent, the factual backdrops are so different that it is questionable whether the two decisions really do conflict. It would be better for this Court to await consideration of the issue by other circuits before deciding the issue itself.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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